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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN MARGAROS, Defendant and Appellant.	E068504 (Super.Ct.No. RIF1502173) OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed with directions.

Kevin Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Alana Cohen Butler and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant and appellant John Margaros was convicted of attempted sexual intercourse or sodomy with a child 10 years old or younger (Pen. Code,[1] §§ 664, 288.7, subd. (a); count 1), attempting a lewd or lascivious act on a child under 14 years of age (§§ 664, 288, subd. (a); count 2), possession of obscene matter showing sexual conduct by a minor (§ 311.11, subd. (a); count 3), and using a minor to prepare matter containing sexual conduct (§ 311.4, subd. (c); count 4). The trial court sentenced defendant to a total prison term of 10 years four months and ordered him to register as a sex offender.

He appeals, contending: (1) the evidence is insufficient to support his two attempt convictions because it only shows mere preparations rather than a direct step toward the crimes; (2) the trial court abused its discretion in admitting videos of him helping a young girl change clothes; and (3) his conduct credit should have been calculated under section 4019, not section 2933.1.

The People concede, and we agree that the trial court erred in awarding defendant presentence conduct credits under section 2933.1 (any person convicted of a "'violent felony'" as defined in § 667.5, subd. (c), shall accrue conduct credit at a maximum of 15 percent of actual time) instead of section 4019. We reject defendant's remaining contentions.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

I. PROCEDURAL BACKGROUND AND FACTS

In January 2014, C.I. began dating defendant. In March 2014, C.I. introduced him to her seven-year-old daughter, Jane Doe, and her 10-year-old son. C.I. testified that early in the relationship, things started to "turn abnormal." First, defendant disclosed that "his fantasy" involved "panties of young girls." Next, he commented on a picture of Jane that C.I. had taken when her children played on a friend's stripper pole. When she showed them to defendant, he pointed to Jane's crotch area and said, "Oh, look. You can see something there." Defendant then began asking C.I. for more explicit pictures, specifically requesting pictures of "[Jane's] hole." He told C.I. he wanted to "rape" and "molest" Jane, and he wanted her (C.I.) to do the same. He asked her to bring him Jane's dirty panties, explaining, "I want there to be cum in them."

During their relationship, defendant and C.I. had sexual intercourse with each other one time. They primarily engaged in phone sex and what C.I. described as "'car dates.'" During the car dates, which involved masturbation and sometimes oral sex, defendant talked about "what he wanted to do and what he wanted [C.I.] to do to [Jane] and what it was going to be like." Defendant talked about C.I. digitally penetrating Jane and sexual acts that would be involved if they had "a threesome together." Sometimes defendant would call C.I. from his work, telling her that he was masturbating in the bathroom. Other times, he would discuss his fantasy of "being with [Jane]."

At the end of March 2014, defendant told C.I. that he had to move to Idaho. While he was gone, they continued to interact via text messages and phone sex, and she supplied him with pictures of Jane. On April 11, defendant texted C.I., "You like 7 year old pussy don[']t you?'" She responded, "I took a screen shot," referring to a picture or video she had taken of Jane. Defendant replied, "Send!!!! Love you."

In June 2014, when defendant returned to California, the two resumed seeing each other in person. Defendant became more demanding in his requests regarding Jane. He seemed frustrated with C.I.'s delay in complying with his demands, wanting to know why "it [was] taking so long," why C.I. had not molested Jane, and why she had not provided more naked pictures of Jane, mainly of her "hole." When defendant was with C.I. and her children, he wanted Jane to wear "skirts with no leggings." C.I. and defendant took pictures of Jane's panties and crotch area, which were exposed while she was playing on the jungle gym, sitting in her car seat, or squatting down.

One day, at the park, after defendant had been playing with Jane, he told C.I., "'Oops. We were playing and oops my finger slipped in.'" Another day, they were at a Halloween store when defendant told C.I. that he was going to lift Jane up and hold her at an angle so that C.I. could take a picture of Jane's crotch area. Defendant then picked Jane up, held her with her legs spread apart, while C.I. photographed her crotch area. At defendant's request, C.I. also took pictures and videos of Jane's "private areas or compromising positions." C.I. estimated that she sent approximately 10 to 20 pictures and videos of Jane's private area to defendant.

Defendant gradually spoke in more detail about what he wanted C.I. to do, specifying what, when, how and where. They talked several times about getting a hotel room and having "a threesome" with Jane.[2] Defendant told C.I. that Jane "'ha[d] to be ready.'" He urged her to digitally penetrate Jane's vagina and anus to get her ready for him. He exhorted her by saying, "You just need to pull down her pants and just do it." He encouraged her several times to try to get her son "out of the picture," so the two of them could be alone with Jane. They talked about drugging Jane, using Nyquil or putting Fireball, a cinnamon flavored whiskey, in a drink. On one occasion, they had a bottle of Fireball with them, and defendant suggested putting it in the children's drinks. On another occasion, defendant physically "brought some drugs with him."[3] C.I. believed it

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[2] C.I. clarified that she talked about getting a motel room "for [defendant's] birthday for just he and [C.I.] because [they] hadn't been intimate in all of this time except for really one time when [they] had sexual intercourse."

[3] When C.I. was arrested, she "only mentioned the use of Fireball or cinnamon whiskey and Nyquil." However, at trial, she testified as follows:

"Q. [BY PROSECUTOR] . . . [¶] You talked about his desire for molestation or raping her. What types of things transpired regarding the molestations or rapes that were being discussed?

"A. [BY C.I.] There had been talk several times about us getting a hotel room and having a threesome. That never transpired. [¶] . . . [¶]

"Q. . . . You are discussing with him about going to get a motel room so that you both could sexually assault your daughter; is that correct?

"A. Yes. But I didn't intend to assault my daughter. That was part of his fantasy.

"Q. Did you talk about how you would potentially drug your daughter?

"A. Yes.

"Q. And could you describe that to us?

"A. There was the mention of Fireball.

"Q. What's Fireball?

[footnote continued on next page]

was Vicodin or a pain reliever. Defendant said, "I have two pills with me," which he wanted to put in the children's drinks.

On October 31, 2014, the two engaged in the following conversation via text message:

"From [C.I.]: . . . Kids r out at 11 30 today

"To [C.I.]: . . . Ok

"To [C.I.]: . . . Are you going to get me some pantie and pussy shots to day?

"To [C.I.]: . . . I really want some

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"A. Fireball is an alcohol. And putting that in a drink. On one occasion, he brought some drugs with him. I don't recall what kind they were, but I believe it was Vicodin.

"[DEFENSE COUNSEL]: Objection. That's calling for speculation. . . .

"THE COURT: Overruled.

"Q. BY [PROSECUTOR]: Some type of drug, you believe was Vicodin, with him?

"A. [BY C.I.] Or a pain reliever. He said, I have two pills with me. And . . . that didn't happen.

"Q. Okay. We know that didn't happen, but back up for a second. What did happen? What was the discussion? That he brought the pills; then what was the discussion?

"A. He wanted to put them in the drinks of the kids. [¶] . . . [¶] On several occasions he would encourage me to try and find a playdate for my son or, you know, have my son go over to a friend's house. You know, there were several times where he just wanted it to be me and him and my daughter, and he would encourage me to, I guess, try and get my son out of the picture so the three of us could be alone." [¶] . . . [¶]

"Q. And how many times do you think he -- how many times did he do something physically, like bring over a drug, or something of that nature?

"A. I think it was only once or twice, I know, specifically, for the drugs. That instance. [¶] And there was another occasion -- I can't recall if I had bought a bottle of Fireball or if he had bought a bottle of Fireball, but it was with us."

"From [C.I.]: . . . Will do my best

"To [C.I.]: . . . Make it happen . . . I know you can and you want to

"From [C.I.]: . . . K."

On November 1, 2014, the following exchange took place:

"From [C.I.]: . . . Home…be careful it's raining

"To [C.I.]: . . . More photos please

"From [C.I.]: . . . How about glad you ma[d]e it home safe…Thanks for the pictures you did get. Gosh babe

"To [C.I.]: . . . I am so in love with you and I am glad you are safe!!

"To [C.I.]: . . . Thank you my love!

"To [C.I.]: . . . Do you get them today?

"To [C.I.]: . . . Can we put her in the same outfit with the panties of my choice? ;)"

The next day, defendant wanted to have phone sex with C.I., but she was not interested. Instead, she texted him, "Jerk off in the shower to [Jane] fisting me." This was one of the things that defendant had told C.I. he wanted her to do with Jane. Defendant replied, "We are going to put her in the panties of my choice in tha skirt [t]o day ;) [¶] . . . Please please! [¶] . . . So I can help her play and ooops a finger slips on it in it!" C.I. believed that defendant was referencing the time he had previously touched Jane in that manner at the park.

By November 2014, C.I. was living in a homeless shelter. When the children were with her, defendant constantly texted her requesting pictures of Jane or asking if she was

going to "take action" in touching Jane. On November 10th and 11th, C.I.'s children did not have to attend school. After C.I. and the children spent November 10th with defendant, C.I. "was looking forward to having . . . the kids to [herself on November 11th]." That morning, C.I. picked up the children and within five minutes defendant called her. When she did not answer, he kept calling. She drove to her mother's house where she started drinking. Because she did not "know what to do or how to walk away from the relationship," she got very drunk. She called two women she knew at the homeless shelter and told them she needed help. They came over and called C.I.'s mother, who came home and called the police.

C.I. told the police what had been going on with defendant and showed them the pictures and videos of Jane on her cell phone. C.I. was arrested and later pled guilty to production of child pornography with a minor, in violation of section 311.4, subdivision (c). C.I. agreed to testify against defendant.

A search of defendant's laptop computer revealed 33 videos and 60 images of child pornography. Four of the videos were of defendant filming an unidentified young girl changing clothes. Six photographs depicted adult men engaged in sexual intercourse, sodomy, and/or oral copulation with prepubescent girls. Defendant was arrested, and his cell phone was seized. His cell phone contained images of child pornography. There were photographs of Jane at the park, in her car seat showing her panties, and nude in the shower. There were also several photographs of other prepubescent girls engaged in sexual conduct.

Defendant called his adult daughter and asked her to change the password on his email account and delete certain messages. She opened those messages and saw pictures of "an underaged girl in very sexual positions." She secured the messages and provided them to the Corona Police Department.

II. DISCUSSION

A. Insufficiency of Evidence

Defendant challenges his convictions on counts 1 (attempted sexual intercourse or sodomy with a child 10 years old or younger) and 2 (attempting a lewd or lascivious act on a child under 14 years of age). He contends the evidence is insufficient to show that his conduct passed beyond the preparatory stage to the actual commencement of commission of the underlying offenses. We conclude the record discloses substantial evidence to support his convictions.

1. Legal Authority

"'"An attempt to commit a crime consists of a specific intent to commit the crime, and a direct but ineffectual act done towards its commission. [Citation.] Commission of an element of the underlying crime other than formation of intent to do it is not necessary. [Citation.] Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design will be sufficient. [Citations.]"'" (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1385-1386 (*Herman*); see § 21a.)

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "And in the case of a prosecution for attempt, an additional rule is applicable. Acts that could conceivably be consistent with innocent behavior may, in the eyes of those with knowledge of the actor's criminal design, be unequivocally and proximately connected to the commission of the crime; it follows that *the plainer the intent to commit the offense, the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement*. [Citations.]" (*People v. Dillon* (1983) 34 Cal.3d 441, 455, italics added.)

2. Defendant's Conviction of Attempting to Commit a Lewd or Lascivious Act on a Child Under 14 Years of Age Is Supported by Sufficient Evidence

Defendant contends the evidence fails to show that he took any direct or immediate steps toward committing a lewd or lascivious act on Jane. We disagree. His

actions toward Jane in the attempted section 288 count "indicate[d] a certain, unambiguous intent to commit that specific crime, and, in themselves, [we]re an immediate step in the present execution of the criminal design." (*People v. Jones* (1999) 75 Cal.App.4th 616, 627.)

Section 288, subdivision (a), in relevant part, provides: "Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." The statute is violated if there is "'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452 (*Martinez*).) "The touching required by section 288[, subdivision](a) may be constructive. [Citations.] That is, 'a defendant need not touch the victim in order to violate section 288.' [Citation.]" (*People v. Villagran* (2016) 5 Cal.App.5th 880, 890.) The intent of arousing the sexual desires of either the perpetrator or the child "may be inferred from the circumstances." (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 440.) "In determining whether the defendant acted with the required specific intent, the jury therefore looks to all the circumstances, including the charged act. [Citation.] 'Other relevant factors can include the defendant's extrajudicial statements [citation], other acts of lewd conduct admitted or charged in the case [citations], the relationship of the parties [citation], and any coercion, bribery, or deceit used to obtain the victim's cooperation or to avoid detection [citation].' [Citation.]" (*Villagran,* at p. 891.)

Here, the evidence is sufficient to support defendant's conviction of attempting to commit a lewd act on a child under 14 years of age. He confessed his intention when he disclosed his fantasy involving young girls and repeatedly requested C.I. to lewdly touch Jane. If C.I. had lewdly touched Jane, defendant's "clear-cut child molesting intent" would have been carried out. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1323 (*Crabtree*) [defendant properly convicted of attempted violation of § 288, subd. (a), after "sexually charged online chats" (*Crabtree,* at p. 1322) with child]; see *People v. Hanna* (2013) 218 Cal.App.4th 455, 457-460 [defendant convicted of violation of § 288, subd. (a), based on communications by email and instant messaging]; *People v. Imler* (1992) 9 Cal.App.4th 1178, 1182 [defendant's intent may be inferred when he orders the commission of a lewd act regardless of whether his orders are carried out].)

Moreover, the record supports a finding that defendant did touch Jane. C.I. testified that when she was at a Halloween store with defendant and Jane, he told C.I. that he was going to lift Jane up and hold her at an angle so that C.I. could take a picture of Jane's crotch area. Defendant then picked her up, and held her with her legs spread apart while C.I. took a picture, which was introduced into evidence. The nominally innocent acts of picking up Jane and holding her with her legs spread apart are sufficient to constitute a violation of section 288, subdivision (a), when considering defendant's intent. "[T]he lewd character of an activity cannot logically be determined separate and apart from the perpetrator's intent. It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as part of a normal and healthy upbringing. On the other hand, any of these intimate acts may also be undertaken for the

purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent or sexual, such behavior may fall within or without the protective purposes of section 288. As the vast majority of courts have long recognized, the only way to determine whether a particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances." (*Martinez*, *supra*, 11 Cal.4th at p. 450; see *People v. Lopez* (1998) 19 Cal.4th 282, 290 ["a lewdly intended embrace innocently and warmly received by a child might violate section 288"].)

Defendant's intent was evident from conversations with C.I. requesting her to touch Jane, his text messages to C.I., the pictures he kept on his computer, and the video of him touching another unidentified young girl as she changed clothing. Defendant's touching of Jane amounted to an offense proscribed in section 288, subdivision (a), and it constitutes a direct and immediate step in furtherance of defendant's plan to commit a lewd act on her. (§ 663 ["Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt . . . ."]; *People v. Imler*, *supra*, 9 Cal.App.4th at p. 1182 ["[H]e had the apparent ability to commit the crime and had gone beyond mere preparation. [Citations.]"].)

Based on defendant's actions at the Halloween store, the jury had sufficient evidence from which it could conclude defendant attempted to commit a lewd or lascivious act on Jane.

3. Defendant's Conviction of Attempted Sexual Intercourse or Sodomy with a Child 10 Years Old or Younger Is Supported by Sufficient Evidence

Defendant contends that the evidence fails to show that he took any direct or immediate steps toward sexual intercourse or sodomy with Jane. We discuss and reject defendant's contention based on the relevant case law interpreting what evidence is sufficient to support a finding of attempt.

Section 288.7, subdivision (a), in relevant part, provides: "Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony . . . ." "Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Citations.]" (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 79 (*Mendoza*).) "Sodomy similarly requires penetration, however slight." (*Ibid.*) Once again, "[a]n attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) To affirm defendant's conviction of attempted sexual intercourse or sodomy with Jane, there must have been evidence from which a reasonable jury could find that defendant intended to commit the crime and that his actions amounted to a direct but ineffectual act toward committing the crime.

Here, defendant's intent was evident from the pictures found on his computer depicting men engaged in sexual intercourse and sodomy with young girls, his conversations with C.I. conveying his plan to engage in a threesome wherein he would rape Jane and perform sexual acts upon her, and his request that C.I. digitally penetrate Jane's vagina and anus to get her ready for him. The difficult issue is whether the evidence is sufficient to show that his actions constituted a direct but ineffectual step

toward engaging in sexual intercourse or sodomy with Jane. We begin by reviewing the relevant case law on attempted sexual conduct offenses.

In *People v. Reed* (1996) 53 Cal.App.4th 389, a detective, posing as a mother who wanted to sexually educate her minor daughters, answered the defendant's advertisement seeking women of "any" age to keep up with his sexual appetite. (*Id.* at p. 393.) The defendant agreed to meet at a motel where he would "teach" the girls about sex, and he described the sexual activities he would engage in with them. (*Id*. at pp. 394-395.) He went to the motel room with sex toys and lubricating jelly. After the defendant announced that he was ready to meet the girls, a sheriff's deputy, who was posing as the mother, led him into an adjoining room where he was arrested. (*Id*. at p. 395.) He challenged his conviction for attempting to commit a lewd act, arguing that his conduct constituted mere preparation. (*Id*. at pp. 393, 397.) Referencing the California Supreme Court's analysis of what constitutes a "direct but ineffectual act" of the crime of attempt (*People v. Dillon, supra,* 34 Cal.3d at pp. 451-456), we rejected the defendant's challenge. (*People v. Reed,* at pp. 398-399.) We concluded that his "act of walking with the undercover deputy into the room . . . was clearly a step beyond mere preparation for the crime," and that "this was an unequivocal first act in carrying out the intended crime." (*Id*. at p. 399.)

In *People v. Ansaldo* (1998) 60 Cal.App.4th 1190 (*Ansaldo*), the defendant picked up three minor girls in his utility truck on the pretext that he wanted them to do work for him. (*Id*. at pp. 1192-1194.) When they were in his home office, he confessed that he was a "dirty old man" with a "perverted mind," and that "he liked to 'eat girls[,]' to have

them take off their clothes and watch them, to take pictures of them in the nude and 'to fuck.'" (*Id*. at pp. 1192, 1194.) The defendant repeatedly propositioned the girls for sex. (*Id*. at pp. 1194-1195.) Although defendant convinced two of the girls to engage in sexual conduct, he did not convince the third one. (*Id.* at p. 1195.) On appeal, defendant challenged his conviction of attempted lewd and lascivious acts on the "second" girl who refused to participate. (*Ibid*.) This court rejected his challenge, stating: "There can be no doubt, based on [the defendant's] strikingly similar methods of operation involving all three victims, that his intent to commit lewd and lascivious acts on the second victim was clearly shown. As [*People v. Memro* (1985) 38 Cal.3d 658, reversed on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2,] holds, in such a case, slight acts done in furtherance are all that is necessary. [The defendant's] attempt to have the second victim ingest drugs, his comment, which frightened her, and his offer of money for sex went beyond mere preparation. The fact that *she* interpreted his request to be for sex at some future point is not determinative. The jury was free to infer that had she, like her sister, agreed to his request, [the defendant] would have proceeded, at that moment, with the lewd and lascivious acts, just as he had with the other two victims." (*Ansaldo*, at p. 1197.)

The *Ansaldo* court found the following language in *People v. Memro* (1985) 38 Cal.3d 658 (*Memro*) to be relevant: ""[W]henever the design of a person to commit a crime is clearly shown, *slight acts* done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act

done toward the commission of a crime." [Citations.]'" (*Ansaldo, supra*, 60 Cal.App.4th at p. 1197.)

In *Memro*, the defendant invited a minor boy to his apartment to have a soft drink, but "[t]he invitation was probably a ruse for other contemplated activity, since [the defendant] indicated that he 'had in the back of his mind' that he would try to take pictures of the boy in the nude." (*Memro*, *supra*, 38 Cal.3d at p. 699.) At the apartment, the defendant took the boy into a bedroom and turned on black strobe lights. The defendant sat on the bed as the boy stood by watching the lights. When the boy indicated he was leaving, the defendant "became angry, grabbed the clothesline and strangled him." (*Ibid*.) The defendant confessed to binding the boy's hands, but he could not recall whether he tied them before he strangled the boy. (*Ibid*.) The *Memro* court observed, "No specific 'plan' vis-a-vis [the boy] had been formulated. Nevertheless, the 'arrangement' of lights, pornographic materials and other paraphernalia in [the defendant]'s apartment would suggest sufficient planning to enable [the defendant] to commit lewd conduct once a willing participant came along. [¶] It is true that the simple act of accompanying [the boy] up to [the defendant]'s apartment probably fell within the 'zone of preparation.' However, [the defendant] went beyond preparation. He ushered the boy into the bedroom to watch the strobe lights and stayed close by. These were steps which furthered his aim of readying [the boy] for a nude photography session which was, in all likelihood, intended to culminate in lewd conduct. These acts, therefore, constituted the 'actual commencement of his plan' and were sufficient to support an attempt. [Citation.] But for [the boy]'s abrupt decision to leave the apartment, it is likely

that these steps would have resulted in a completed violation of section 288. [Citation.]" (*Ibid.*)

In *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170 (*Hatch*), a young woman posed as a 13-year-old girl as part of a sting operation. She met the defendant online in a chat room and later in person at a hotel pool. (*Id*. at pp. 177-178, 180-181.) During their online conversations, the defendant suggested they meet and engage in sexual conduct. (*Id*. at p. 180.) When they met at the hotel pool, he showed the girl nude pictures of himself, told her about his sexual plans, and then invited her to go with him to his truck. (*Ibid*.) When she refused his invitation, he got angry and went to his truck. She followed. At the truck, he again tried unsuccessfully to convince the girl to get inside. (*Ibid*.) On appeal, the defendant argued that this evidence was insufficient to support his conviction of attempted seduction of a minor. (*Id*. at p. 184.) The Court of Appeal disagreed, holding that his acts of trying to convince the girl "to accompany him into his truck, and when [she] later followed him to his truck, he again tried to convince her to enter the truck . . . went beyond mere preparation for sexual molestation and constituted immediate steps in the present execution of the criminal design." (*Id*. at p. 188.)

In *Crabtree*, *supra*, 169 Cal.App.4th 1293, from 2002 through 2005, the defendant contacted several young girls through the internet, suggesting they meet and engage in sexual activities. For one of the girls, he told her that "he would send her money to buy a Greyhound bus ticket. While discussing what they would do when they met and got a room, he said they would 'cuddle' under a blanket, engage in sex[, and] take a bubble bath together." (*Id*. at p. 1307.) Approximately one month later, the defendant contacted

the girl to inform her that he had purchased a bus ticket and was sending it to her with $20 for food. He later provided instructions on which station she would arrive and where to meet him. An FBI special agent spotted defendant's vehicle parked at the bus station and observed the defendant approach three different young females. Following the defendant's arrest, the special agent recovered various items from the defendant's vehicle, including a laptop, a massaging device, a bottle of Viagra, condoms, bubble bath, and a bikini. (*Id.* at pp. 1307-1308.) Based on the defendant's actions, he was convicted of attempted lewd act upon a child. He appealed his conviction, arguing that the facts showed that he "'had not reached the stage where the preparation had ended and the crime begun, so as to make the attempt complete.'" (*Id.* at p. 1322.) The Court of Appeal disagreed, noting that the defendant did not "contest the fact he drove to the bus station where he expected [the minor girl] to appear pursuant to his devious plan. He does not challenge the fact that, upon his arrest, Viagra, condoms, a bikini, and bubble bath were discovered in his trunk. The presence of these items, which are consistent with [the defendant's] sexually charged online chats with [the girl,] and the fact he had bought the bikini shortly before his anticipated meeting with [her,] strongly show [his] intent to carry out his intended lewd act upon [her.] Nothing more was necessary." (*Ibid.*) Rejecting the defendant's position that he "obviously" was not going to have sex at the bus station, but would have had to take the girl to a hotel, the appellate court observed, the defendant "would have the law require the police to watch idly until he actually entered a hotel room with [the girl] to carry out his clear-cut child molesting intent. The law is otherwise." (*Id.* at p. 1323.)

In *Herman, supra,* 97 Cal.App.4th at p. 1374, the defendant first telephoned teenage girls via a pay phone outside a liquor store. He asked what sexual acts the girls would perform for money. They said they were not interested. (*Ibid*.) Shortly after the girls ended the call, the defendant showed up and confronted them. He "pulled out money and held it in front of them, showing it to them. He invited them into his car and 'wanted [them] to go with him around the corner to the park.'" (*Ibid*.) They declined and told him they were going to call the cops. (*Ibid*.) Affirming the defendant's convictions for attempted lewd acts, the Court of Appeal reasoned: "[W]hen a caller follows up lewd telephonic propositions by acting deliberately to meet his victims in person, whereupon he offers incentives to participate in the suggested acts and proposes that they immediately accompany him to a place where such acts may presumably take place, a rational person could easily conclude beyond a reasonable doubt that 'a crime [was] about to be committed absent an intervening force.' [Citation.] The intervening force in this instance was the girls' refusal to accompany defendant. But that merely rendered defendant's conduct ineffectual. The evidence supports a finding that an attempt was underway, and that but for the girls' refusals, violations of section 288 would have immediately ensued." (*Id*. at pp. 1390-1391.)

Nonetheless, the defendant in *Herman* cited *People v. Reed, supra,* 53 Cal.App.4th at page 399, referencing its identification of the defendant's "walking with the undercover deputy into the room . . . [as] clearly a step beyond mere preparation for the crime," and that "this was an unequivocal first act in carrying out the intended crime." (*Herman, supra,* 97 Cal.App.4th at p. 1391.) In response, the Court of Appeal stated:

"These dicta hardly represent considered support for defendant's position here. [In *People v. Reed, supra,* 53 Cal.App.4th 389,] [t]he court had no occasion to determine the exact moment at which the defendant's conduct ripened into an attempt. It seems to us that his act of stepping into the room, far from being the 'first' act in execution of a criminal plan, was very nearly the *last* act necessary to the completion of the crime. Indeed, since the intended victims did not exist, it is difficult to imagine what further step was possible. We doubt very seriously that the court would have reached a different result if the defendant had been arrested before stepping into the room. In our opinion he could have been convicted of an attempt upon his arrival at the motel—which is the moment at which a reasonable juror could conclude that his conduct unequivocally confirmed his criminal intentions by demonstrating that his correspondence with the 'mother' was not a mere 'fantasy' but reflected a concrete criminal plan he fully intended to carry out." (*Ibid.*)

According to defendant, the common thread in each of these cases is the defendant meeting with, or on route to meet with, the intended victim and being ready, willing, and able to commit the crime, which would have immediately ensued, but for some intervening act. In contrast, defendant contends his alleged attempts "never came close to reaching that stage over an eight-month period" because an "attempt to violate [section] 288.7[, subdivision](a), alleged in Count 1, would require a direct and immediate act toward accomplishing 'penetration' of the girl 'by the penis.' See *People v. Mendoza, supra,* 240 Cal.App.4th at 79." We disagree, finding defendant's reliance on *Mendoza* to be misplaced.

The *Mendoza* court never considered whether an attempted violation of section 288.7 required a direct and immediate act toward accomplishing penetration of a young girl by the penis. (*Mendoza*, *supra*, 240 Cal.App.4th at pp. 79-84.) Rather, the issue in *Mendoza* was whether attempt is a lesser included offense of sexual intercourse or sodomy with a child 10 years old or younger to section 288.7, subdivision (a). Concluding that it was not, the *Mendoza* court reasoned: "Attempted sexual intercourse, attempted sodomy . . . with a child 10 years of age or younger are . . . specific intent crimes. [Citation.] Thus, under the elements test, they are not lesser included offenses of the charged general intent crimes. [Citation.] Because of the different mental states required, a defendant could be guilty of the completed offense [of sexual intercourse or sodomy] but not the attempt." (*Mendoza*, at p. 83.) Here, defendant was charged with attempt, not sexual intercourse or sodomy with a child 10 years old or younger. The California Supreme Court has held that the commission of an attempt does not require proof of any particular element of the completed crime. (See *People v. Scott* (2011) 52 Cal.4th 452, 488 [attempted rape]; *People v. Lindberg* (2008) 45 Cal.4th 1, 30 [attempted robbery].) Therefore, the *Mendoza* court's discussion regarding the evidence needed to prove a violation of section 288.7, subdivision (a), is irrelevant. (*People v. Partida* (2005) 37 Cal.4th 428, 438, fn. 4 [cases are not authority for propositions not considered].)

Nonetheless, defendant asserts that there is no evidence that he "took any direct step to effectuate" a sexual encounter with Jane because there is no evidence that he rented a hotel room, removed Jane's brother from their presence, was alone with Jane,

sedated her with medicine or alcohol, or was naked in her presence. We reject defendant's efforts to limit the type of acts that may constitute the initiation of the criminal offense. As already noted, "No clear marker divides acts that are merely preparatory from those initiating the criminal act. Nonetheless, 'the more clearly the intent to commit the offense is shown . . . "the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement"' of an attempt. [Citation.]" (*Crabtree, supra,* 169 Cal.App.4th at p. 1322.)

Given the evidence of defendant's clear intent, we look to his "'steps in the early stages of the commission of the crime'" and determine whether there was sufficient evidence of the overt act requirement. (*People v. Garton* (2018) 4 Cal.5th 485, 532.) To that end, "[o]ur attempt jurisprudence calls for a pragmatic, case-specific approach; '"the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime." [Citations.]'" (*Id.* at p. 511.)

Here, the evidence shows that C.I. and defendant discussed having a threesome with Jane, renting a hotel room for the three of them, sedating Jane with medicine or alcohol, removing C.I.'s son from their presence or drugging him, and having C.I. prepare Jane for sex. With the exception of engaging in a threesome with Jane, these actions constitute acts done in preparation, or toward the commission, of the charged offense. While we agree with defendant's claim that none of these actions "ever took place," it is not these actions that we find relevant to our analysis. Rather, we consider

the evidence that defendant "brought some drugs" to put in the children's drinks.[4] This action is analogous to conduct deemed sufficient to constitute an act done toward the commission of the charged offense. (*People v. Reed*, *supra*, 53 Cal.App.4th at pp. 394-395, 399 [walking into a hotel room with sex toys and lubricating jelly "was an unequivocal first act in carrying out the intended crime"]; *Ansaldo*, *supra*, 60 Cal.App.4th at p. 1197 [attempt to have victim ingest drugs, defendant's frightening comment and offer of money for sex went beyond mere preparation]; *Memro*, *supra*, 38 Cal.3d at p. 699 [ushering victim into the bedroom and staying close by constituted actual commencement of defendant's plan to violate § 288]; *Hatch*, *supra*, 80 Cal.App.4th at p. 188 [acts of trying to convince the victim to go with him to his truck and enter the truck "constituted immediate steps in the present execution of the criminal design"]; *Crabtree*, *supra*, 169 Cal.App.4th at p. 1323 [driving to the bus station where the defendant expected the victim to appear was sufficient to establish attempt; it was not necessary to wait for the defendant to take the victim to a hotel]; *Herman*, *supra*, 97 Cal.App.4th at pp. 1390-1391 [attempt to violate § 288 was supported by defendant deliberately meeting the victims (after engaging in lewd telephonic propositions) and proposing they accompany him to another place to participate in suggested sexual acts].)

[4] See footnote 3, *ante*.

Although C.I. did not put the drugs in her children's drinks, defendant wanted her to do so, given his explicit plan to engage in sexual intercourse or sodomy with Jane once she was drugged. The act of bringing drugs to the place where Jane was present[5] provided sufficient evidence from which a reasonable jury could find that defendant was putting his plan into action. (*People v. Reed*, *supra*, 53 Cal.App.4th at p. 399 ["act of walking with the undercover deputy into the room . . . was clearly a step beyond mere preparation for the crime"].) But for C.I.'s refusal to give her children drugs, a reasonable jury could conclude that defendant would have carried out his clear intent of engaging in sexual intercourse or sodomy with Jane.

We reject defendant's challenge to the evidence that he "brought some drugs with him" on one occasion based on the inconsistency between C.I.'s trial testimony (drugs) and her statements at the time of her arrest (alcohol or Nyquil). Contradictions, inconsistencies or discrepancies in testimony go to the weight of the evidence and "'are matters solely for the consideration of the trier of fact.'" (*People v. Merrill* (1951) 104 Cal.App.2d 257, 263.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact.

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[5] During oral argument, defense counsel argued there was no evidence that Jane was present at the time defendant "brought some drugs with him." We disagree. Because the only reason for bringing the drugs was to put them in the children's drinks, circumstantial evidence supports a finding that Jane and her brother were present. More importantly, whether or not Jane was present is irrelevant. (*People v. Reed*, *supra*, 53 Cal.App.4th at p. 399.)

[Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181; see *People v. Hovarter* (2008) 44 Cal.4th 983, 996 ["'Except in . . . rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution.'"].) Here, defendant's argument is an attempt to attack C.I.'s credibility. As such, his argument may not be the "basis for a reversal of the judgment on appeal." (*People v. Ennis* (2010) 190 Cal.App.4th 721, 725; see *People v. Thompson* (2010) 49 Cal.4th 79, 125 ["'it is not a proper appellate function to reassess the credibility of the witnesses'"].)

Likewise, we reject defendant's challenge to the evidence that he brought drugs when he met C.I. on the ground that it amounts to the uncorroborated testimony of an accomplice. "Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn therefrom. [Citations.]" (*People v. Garrison* (1989) 47 Cal.3d 746, 772.) An examination of C.I.'s testimony shows that she consistently denied harboring the intent to touch Jane or allow defendant to touch her, even though she (C.I.) admitted to performing certain activities that aided defendant's attempted lewd and lascivious conduct with Jane. The truthfulness of C.I.'s account of defendant's actions and the existence of facts which were material to a determination of C.I.'s status as an accomplice were central factual issues at trial. The jury was instructed with CALCRIM No. 334 "Accomplice Testimony Must Be Corroborated: Dispute Whether Witness is Accomplice" as to their duty to determine whether C.I. was an accomplice and, if so, whether her testimony was corroborated.

Having properly left the determination of C.I.'s status to the jury, we find sufficient evidence to support a factual determination that she was not an accomplice to the offenses charged in either counts 1 or 2.

Based on the record before this court, the jury had sufficient evidence from which it could conclude defendant attempted sexual intercourse or sodomy with Jane.

B. Admission of Video Evidence Under Evidence Code Section 1108

Defendant contends the trial court abused its discretion by admitting video evidence of uncharged incidents involving another unidentified young girl. We find no abuse of discretion.

"Evidence must be relevant to be admissible [citation]; that is, it must have some 'tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action' [citation]. A plea of 'not guilty' 'place[s] all material issues in dispute' [citations]." (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 822.) Here, the video evidence sheds light on whether defendant had a propensity to commit acts of sexual misconduct against young girls. (*Ibid*.)

Generally, evidence of uncharged acts is inadmissible to prove criminal disposition. (Evid. Code, § 1101, subd. (a).) However, Evidence Code section 1108, subdivision (a), "carves out an exception to [Evidence Code] section 1101. It provides that '[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code s]ection 1101, if the evidence is not inadmissible pursuant to [Evidence Code s]ection 352.' [Citations.] [Evidence Code s]ection 352, in

turn, sets out the general rule that '[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' [Citation.]" (*People v. Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 823.) Evidence Code section 1108, subdivision (d)(1), defines "'[s]exual offense'" crimes as including the commission of a lewd and lascivious act on a child under 14 years of age with the intent of arousing the passions of the perpetrator or the victim (Pen. Code, § 288, subd. (a)).

We review the trial court's rulings admitting evidence under Evidence Code sections 1101 and 1108 for abuse of discretion. (*People v. Cordova* (2015) 62 Cal.4th 104, 132.)

Defendant argues the trial court abused its discretion in admitting the videos because it failed to consider the factors articulated in *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*). In that case, the Court of Appeal identified five factors to consider in determining whether evidence of prior sexual acts was properly admitted pursuant to Evidence Code section 1108: (1) the probative value of the evidence; (2) the inflammatory nature of the evidence; (3) the possibility of confusion of the issues; (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses; and (5) the remoteness in time of the uncharged offenses. (*Harris*, at pp. 737-741.) Here, while the trial court did not engage in a discussion of these five factors, the record shows that it was aware of and performed its balancing function under Evidence Code section 352. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1285 ["With respect to relevant

factors *not* mentioned by the trial court, we note that 'a court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing function under Evidence Code section 352.' [Citation.]"].)

Prior to trial, the prosecution sought to admit four short videos depicting a man having a young girl change in front of him and pose in various ways to reveal her underwear. The videos further show the man spreading apart the knees of the girl to reveal her underwear. C.I. identified defendant's voice as the voice of the unseen man. No one identified the girl or when and where the videos were made. Defendant objected on the ground that "the prejudice is huge," and the court must consider remoteness because "[w]e have no idea how old, where, or what? All we have is testimony that that's his voice." Agreeing that he could not "identify the jurisdiction or the date of" the videos, the prosecutor stated that they are purely for purposes of propensity evidence under Evidence Code section 1108. As for prejudice, the prosecutor argued that the videos are "almost identical to the type of videos and photographs that [C.I.] was surreptitiously taking of her daughter and providing to [defendant]."

Overruling defendant's objection, the trial court stated that "even though propensity evidence is admissible, Evidence Code section 352 is still around to help the trial court make a determination as to whether or not this quote, unquote, 'propensity evidence' is more prejudicial than probative. [¶] In this case, I acknowledge that there is some prejudice. We start with the basic principle that all incriminating [evidence] is prejudicial to some extent, it's just a matter of how far does it go? [¶] . . . But in terms of

the propensity, if you will, evidence that is contemplated under [Evidence Code section] 1108, the Court feels it is not so prejudicial as to outweigh the probative effect, and I will permit an argument to them." Later, defense counsel argued the evidence was prejudicial because it purports to show defendant "doing some sort of sexually related act perhaps with another child." In response, the trial court noted the videos appear to show defendant "engaged in some sort of physical conduct with the unknown minor [but] do[] not show anything sexual. In fact, the camera kind of bounces all over the place." The court also observed that the videos were subject to varying interpretations, from playful wrestling to something more serious. The court's remarks demonstrate its awareness of and performance of its balancing function under Evidence Code section 352.

Notwithstanding the above, defendant argues that "an analysis of the factors in [the *Harris*] case overwhelmingly requires exclusion of the video evidence of the prior uncharged offenses and a conclusion that [defendant] was prejudiced by its erroneous introduction." We disagree.

A study of the *Harris* factors supports admission of the video evidence. Regarding the first factor, we agree the videos are inflammatory because they provide evidence of a prior "completed" section 288, subdivision (a), offense; however, the videos are no more inflammatory than defendant's interactions with Jane. Rather, they are like defendant's act of picking up Jane and spreading her legs apart so that C.I. could take a picture, but less graphic than defendant's conversations with C.I. describing what he wanted to do to Jane. (*Harris, supra,* 60 Cal.App.4th at p. 738.) As to the second factor, we conclude there was no risk of confusion of issues resulting in the jury being

more inclined to punish defendant for the uncharged offenses because they are no more serious than his current offenses. (*Id*. at pp. 738-739.) Turning to the third factor, we agree there is no evidence of when the videos were made, but remoteness is not a dispositive factor given the significant similarities between the prior and the charged offenses. (*Id*. at p. 739.) "Remoteness of prior offenses relates to 'the question of predisposition to commit the charged sexual offenses.' [Citation.] In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. However, . . . significant similarities between the prior and the charged offenses may 'balance[] out the remoteness.' [Citation.] Put differently, if the prior offenses are very similar in nature to the charged offenses, the prior offenses have greater probative value in proving propensity to commit the charged offenses." (*People v. Branch* (2001) 91 Cal.App.4th 274, 285.) Finally, defendant concedes that the remaining factors, consumption of time necessitated by introduction of the evidence, and probative value of the evidence (*Harris*, at pp. 739-740) "arguably cut in favor of admissibility."

To summarize, none of the *Harris* factors tip the scale in favor of excluding the videos. We therefore conclude the trial court did not abuse its discretion in permitting the prosecution to introduce them.

C. Presentencing Conduct Credits

Defendant contends, and the People concede, that the trial court erroneously calculated his presentence custody credits under section 2933.1, rather than section 4019. We agree. Defendant was not subject to the 15 percent limit on conduct credits contained

in section 2933.1, subdivision (c), because he was not convicted of a violent felony as defined in section 667.5, subdivision (c). (*People v. Reed* (2005) 129 Cal.App.4th 1281, 1284-1285, fn. 1 [other than attempted murder, an attempt to commit a crime listed in § 667.5, subd. (c), is not a violent felony].)

Based on defendant's 394 days of actual custody, he is entitled to 394 days of custody credit. (§ 4019, subd. (f). ["a term of four days will be deemed to have been served for every two days spent in actual custody"]; *People v. Whitaker* (2015) 238 Cal.App.4th 1354, 1361-1362.) The abstract of judgment should therefore be modified accordingly.

III. DISPOSITION

The judgment is modified to reflect that defendant has 394 days in actual custody and 394 days in conduct credits. (§ 4019, subd. (f).) The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

RAPHAEL

J.